New York Party Shuttle, LLC d/b/a Onboard Tours, Washington D.C. Party Shuttle, LLC d/b/a Onboard Tours, Onboard Las Vegas Tours, LLC d/b/a Onboard Tours, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, a Single Employer and Fred Pflantzer. Case 02–CA–073340

November 16, 2017

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND KAPLAN

The General Counsel seeks partial summary judgment in this compliance proceeding on the basis that the Respondents' answer to the amended compliance specification attempts to raise matters that have already been decided. For the reasons that follow, we grant the General Counsel's motion.

On May 2, 2013, the National Labor Relations Board issued a Decision and Order finding that Respondent New York Party Shuttle, LLC violated Section 8(a)(3) and (1) of the Act by discharging employee Fred Pflantzer. *New York Party Shuttle, LLC*, 359 NLRB 1046, 1046–1047 (2013). Among other things, the Board ordered New York Party Shuttle to offer Pflantzer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Id. at 1047. The Board further ordered that Pflantzer be made whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily. Id. The United States Court of Appeals for the Fifth Circuit enforced the Board's Order on November 19, 2013. *New York Party Shuttle, LLC v. NLRB*, No. 13–60364 (5th Cir. 2013) (entering default judgment). New York Party Shuttle reinstated Pflantzer on July 28, 2014, but terminated him on August 13, 2014, assertedly on the ground that he failed to divest his interest in a competing business.

On February 29, 2016, the Regional Director for Region 2 issued a compliance specification and notice of hearing, alleging that Pflantzer is entitled to immediate and full reinstatement, setting forth backpay amounts allegedly due, and notifying New York Party Shuttle of its obligation to file a timely answer complying with the Board's Rules and Regulations. New York Party Shuttle filed an answer to the compliance specification on March 21, 2016. On March 31, 2017,[1] the Regional Director issued an amended compliance specification, additionally alleging that the Respondents listed in the case caption constitute a single employer. On May 5, the Respondents filed an answer to the amended compliance specification asserting, among other things, that the Order in the underlying unfair labor practice proceeding is invalid because two members of the panel were not properly appointed to their positions. The Respondents also contend that Pflantzer was reinstated, warned that operating a competing business was grounds for termination, and terminated when he failed to cease his competitive activities.

On May 24, the Regional Director issued a "second amendment" to the compliance specification. On June 20, the General Counsel moved for partial summary judgment on the amended compliance specification, contending that the Respondents' answer to that specification attempts to raise two matters that have already been litigated and decided.[2] First, the General Counsel argues that the Respondents' claim that Pflantzer is not entitled to reinstatement and backpay because of his competing business is an issue that the Board resolved adverse to New York Party Shuttle in the underlying unfair labor practice proceeding. Second, the General Counsel contends that the Respondents' challenge to the validity of the underlying Order is an issue that has been previously raised by the Respondents and rejected by the Board. On June 27, the Respondents filed a "first amended answer," in which they continued to advance the two contentions on which the General Counsel seeks summary judgment. On August 14, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted.[3]

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

[1] Hereinafter, all dates are in 2017 unless otherwise specified.

[2] The General Counsel did not seek summary judgment on the "second amendment" to the compliance specification.

In the Motion for Summary Judgment the General Counsel moved to strike those portions of the Respondents' answer alleging that Respondents Party Shuttle Tours, LLC, Washington DC Party Shuttle, LLC, NYC Guided Tours, LLC, and OnBoard Las Vegas Tours, LLC were not served with the amended compliance specification and therefore did not have notice and an opportunity to respond. The Respondents now indicate that they received service but claim that they were not timely served. These are matters to be addressed at the compliance hearing. Accordingly, we deny the motion to strike.

[3] In an Order dated October 27, the Board denied the Respondents' motion to accept their late-filed response to the General Counsel's motion for partial summary judgment, finding that the Respondents had failed to demonstrate excusable neglect.

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) of the Board's Rules and Regulations states, in relevant part:

(b) *Form and contents of answer*. The answer must specifically admit, deny, or explain each and every allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

We examine whether the Respondents' answer to the General Counsel's amended compliance specification satisfies the requirements of Section 102.56(b).

1. The validity of the Order

In their answer to the amended specification, the Respondents challenge the validity of the underlying Decision and Order finding that Respondent New York Party Shuttle violated Section 8(a)(3) and (1) of the Act by discharging Pflantzer because of his union activity. 359 NLRB at 1046—1047. As noted above, the Court of Appeals for the Fifth Circuit enforced the Board's Order on November 19, 2013. Thereafter, on June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), where the Court held that three recess appointments to the Board were invalid, including the appointments of two of the three members who issued the underlying Order in this case.

After the Fifth Circuit enforced the underlying Order, the General Counsel issued several subpoenas duces tecum seeking documents relevant to the compliance stage of this proceeding. In its petitions to revoke the subpoenas, New York Party Shuttle argued that the Board's underlying Order was void ab initio based on the Supreme Court's decision in *Noel Canning*. The Board repeatedly rejected this contention in denying each of the petitions to revoke. See *New York Party Shuttle, LLC,* Case 02–-CA–073340 at 2 fn. 3 (Dec. 8, 2015); *New York Party Shuttle, LLC,* Case 02–CA–073340 at 2 fn. 3 (July 28, 2015); *New York Party Shuttle, LLC,* Case 02–CA–-073340 at 1 fn. 3 (June 12, 2015); *New York Party Shuttle, LLC,* Case 02–CA–073340 at 1 fn. 2 (Oct. 23, 2014). While acknowledging that the underlying Order was issued by a panel that included two members whose appointments were found to be invalid, the Board observed that the Fifth Circuit's judgment enforcing the Board's underlying Order became final prior to the Supreme Court's decision in *Noel Canning*. The Board concluded that, in these circumstances, it regarded the matters finally resolved by the court of appeals as res judicata in this proceeding. E.g., *New York Party Shuttle, LLC,* Case 02–CA–073340 at 2 fn. 3 (Dec. 8, 2015) (citing *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374–378 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)); see also *NLRB v. New York Party Shuttle, LLC,* No. 1:15-MC-00233-P1 (S.D.N.Y. Aug. 27, 2015).

The Board also found that, under Section 10(e) of the Act, it has no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of the court is exclusive and its judgment and decree are final, subject to review only by the Supreme Court. E.g., *New York Party Shuttle, LLC,* Case 02–CA–073340 at 2 fn. 3 (Dec. 8, 2015) (citing *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), enfd. sub nom. *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006)).

Accordingly, because the Board has previously addressed and rejected the Respondents' contention regarding the validity of the underlying Order, we agree with the General Counsel that summary judgment is warranted with respect to this issue. Cf. *M.D. Miller Trucking & Topsoil, Inc.,* 363 NLRB No. 49, slip op. at 2 (2015) (matters decided in an underlying unfair labor practice proceeding may not be relitigated in the compliance stage); *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004) (same).

2. Backpay period

Paragraph 7 of the amended compliance specification alleges that Respondent New York Party Shuttle improperly conditioned full reinstatement of Pflantzer on his divesting any interest in his tour business, which Pflantzer openly operated with New York Party Shuttle's full knowledge and implicit acceptance before his initial discharge. Paragraph 7 further alleges that this knowledge of Pflantzer's tour business did not materially change since the Board issued its underlying Order (the Respondents admitted this in their answer), and that New York Party Shuttle did not implement a uniformly applied policy prohibiting employees from operating their own tour business as a condition of employment. Paragraph 8 of the amended compliance specification alleges that the backpay period begins on February 12, 2012, the

day after Pflantzer's initial discharge, and ends when Respondent New York Party Shuttle extends Pflantzer a valid offer of reinstatement. That paragraph (at 8(b)) also alleges that although New York Party Shuttle reinstated Pflantzer on July 28, 2014, it terminated him on August 13, 2014 (the Respondents admit this in their answer). Paragraph 8 alleges that, because Pflantzer was not validly reinstated, the backpay period continues to run until a valid offer of reinstatement is made.

The Respondents assert that Pflantzer was fully reinstated, warned that operating a competing business was grounds for termination, and thereafter terminated when he failed to cease his competitive activities. The Respondents maintain that, as a result, Pflantzer is not entitled to any backpay after the date of his reinstatement or to a second offer of reinstatement. The Respondents also contend that Pflantzer is not entitled to backpay because he would have been terminated for operating a competing business before the 2012 spring season.

In the underlying decision, the Board found that Respondent New York Party Shuttle unlawfully discharged Pflantzer because of his union activity. 359 NLRB at 1046–1047. Specifically, the Board found that the Respondent failed to give Pflantzer any tour guide assignments after he publicized his union organizational activities and criticized his employer's employment practices in similar email and Facebook postings to third parties. Id. at 1046. The Board additionally found that, in response to the unfair labor practice charge, and again during the hearing before the judge, "the Respondent essentially stated that, notwithstanding other alleged job performance issues, its decision to no longer give Pflantzer tour guide assignments would not have been made but for his . . . union activity." Id. The Board rejected any contention that Pflantzer was discharged for operating a competing business, finding that the Respondent had failed to meet its *Wright Line* burden to show that it would have discharged Pflantzer even in the absence of his union or protected activities. Id. at 1047.

In contending in their answer that reinstatement is not warranted because Pflantzer was operating a competing tour business, the Respondents are attempting to relitigate an issue that was decided in the underlying unfair labor practice proceeding. As the Respondents are precluded from doing so, we agree with the General Counsel that summary judgment is warranted as to paragraphs 7 and 8(a),(c), and (d) of the amended compliance specification. See *M. D. Miller Trucking & Topsoil*, supra, 363 NLRB No. 49, slip op. at 2 (granting in part the General Counsel's Motion for Summary Judgment on a compliance specification where the respondent's answer to the specification advanced an argument regarding the discriminatee's medical certification that had been rejected as pretextual in the underlying unfair labor practice proceeding).

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to paragraphs 7 and 8(a), (c), and (d) of the amended compliance specification.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 2 for the purpose of arranging a hearing before an administrative law judge, which shall be limited to taking evidence concerning paragraphs of the amended compliance specification as to which summary judgment has not been granted.

Dated, Washington, D.C. November 16, 2017

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Philip A. Miscimarra, Chairman

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Mark Gaston Pearce, Member

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD